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Supreme Court of the United States

OCTOBER TERM, 1942

No. 917

BERTHA R. LINDER, in behalf of herself and other
owners of Manhattan 4% Second Mortgage Bonds,

Petitioner,

against

VAN S. MERLE-SMITH and others, as Protective Com-
mittee for Manhattan Railway Company Consolidated
Mortgage 4% Gold Bonds,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND BRIEF
THEREON**

KATZ & SOMMERICH,
Solicitors or Petitioner.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
of Counsel.



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II. There being no contention that the previous appeals, taken by the petitioner to nullify the plan, were not taken in good faith, the petitioner should not be penalized for taking such appeals. There is no proof of any substantial prejudice by reason of Manheim's previous opposition or appeal	11

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TABLE OF CASES CITED

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STATUTES CITED

28 United States Code, § 347	3, 7
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OCTOBER TERM, 1942

No.

BERTHA R. LINDER, in behalf of herself and other owners
of Manhattan 4% Second Mortgage Bonds,

Petitioner,

against

VAN S. MERLE-SMITH and others, as Protective Committee
for Manhattan Railway Company Consolidated Mort-
gage 4% Gold Bonds,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of BERTHA R. LINDER respectfully shows
to this Honorable Court:

Summary and Statement of the Matter Involved

Paul E. Mannheim, acting for himself and *other owners* of Manhattan 4% Second Mortgage Bonds (including the petitioner herein), prosecuted an appeal from decrees and orders entered in connection with the carrying out of the Interborough-Manhattan Unification Plan (R. 21, 91). One of the appeals taken by said Mannheim was from an order of March 15, 1940, which held that the

Plan was fair, equitable and feasible (*American Brake Shoe & Foundry Co. v. Interborough*, 122 F. (2d) 454, cert. denied *Manheim v. Merle-Smith*, 315 U. S. 801).

Prior to the entry of the order for the consummation of the Plan, Manheim moved that "the time for dissenters to assent should be extended now by the City and the Committees until thirty days after final decision in the highest court reached by the case until all rights to appeal on a petition for certiorari have lapsed (R. 92).

The United States District Court entered its order directing the consummation of the Plan (R. 26). This Plan limited the recovery of those dissenting to \$394.68 per bond; those who assented to the Plan received \$500 per bond (R. 32).

The order of the United States District Court (R. 28) also denied the application for an extension of time for dissenters to assent to the Plan.

In the Circuit Court of Appeals, besides arguing that the Plan was unfair and inequitable, Manheim also urged that he should be given at least an amount equal to what he would have received had he assented to the Plan (R. 29). However, the Circuit Court of Appeals affirmed the orders and decrees appealed from, limiting his recovery to \$394.68 per bond (R. 46).

Manheim thereafter applied to the United States District Court for an order directing the acceptance of said bonds *nunc pro tunc* upon such terms and conditions with respect to adjustment of interest or otherwise as may seem equitable and proper (R. 37). Said application was denied on the ground that the previous decision was *res adjudicata* (R. 47). He thereafter filed a notice of appeal from the order denying his application for an order directing the acceptance of his bonds *nunc pro tunc* (R. 85), but at the same time decided to surrender his bonds in exchange for the cash, to wit, \$394.68 per bond (R. 89).

Thereafter, the petitioner applied for leave to intervene (R. 88-90), on her own behalf and on behalf of other present owners who had not surrendered their bonds, so that she might continue the prosecution of the appeal so taken by Manheim. Said application to intervene was granted (R. 95).

Thereafter a motion was made by the respondents to dismiss the said appeal, and on January 18, 1943, an order was entered dismissing said appeal "because no substantial issues remained for decision (R. 103).

Jurisdiction

The jurisdiction of this Court to issue the writ of certiorari applied for rests upon Title 28 of the United States Code, Sec. 347.

Questions Involved

The questions involved are:

- (1) Is the previous decision of the Circuit Court of Appeals, limiting the recovery of the holders of Manhattan Second Mortgage Bonds, *res adjudicata*, preventing such bondholders from making an application to file their bonds *nunc pro tunc* and assenting to the Plan so that they may receive the same amount after adjustment of interest as such bondholders who assented to the Plan?
- (2) There being no proof that the appeals taken by the non-assenting bondholders were not in good faith, was it proper to penalize bondholders, who had not assented to the Plan, by depriving them of equal participation therein to those who had not appealed from the orders confirming the Plan?
- (3) Is not the decision of the Circuit Court of Appeals in this case in conflict with that of the Eighth Circuit in the case of Warner Brothers Pictures, Inc. v. Lawton-Byrne-Bruner Insurance Agency, et al., 79 F. (2d) 804 (C. C. A. 8)?

Reasons Relied on for the Allowance of the Writ

That the United States Circuit Court of Appeals for the Second Circuit, erred:

1. In deciding that the previous decision of the Circuit Court of Appeals, limiting the recovery of the holders of Manhattan Second Mortgage Bonds, was *res adjudicata*, preventing such bondholders from making an application to file their bonds *nunc pro tunc* and assenting to the Plan so that they may receive the same amount after adjustment of interest as such bondholders who assented to the Plan.

2. In deciding that it was proper to penalize the bondholders who have not assented to the Plan, by depriving them of equal participation to those who have not appealed from the orders confirming the Plan.

3. In not following the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Warner Brothers Pictures, Inc. v. Lawton-Byrne-Bruner Insurance Agency, et al.*, 79 F. (2d) 804.

That the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and has so far departed from the accepted and judicial course of proceedings as to call for the exercise of this Court's power of supervision, and that the decision is in conflict with the ruling of the Circuit Court of Appeals, Eighth Circuit.

WHEREFORE your petitioner prays for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit in the cause entitled *The American Brake Shoe and Foundry Company, et al.*, against *Interborough Rapid Transit Company, et al.*; that said cause may be reviewed and determined by this

Court, and that the order of the said United States Circuit Court of Appeals may be reversed and set aside, and for such further relief and remedy in the premises as this Court may deem meet and proper.

BERTHA LINDER,
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Solicitors for Petitioner.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
Counsel for Petitioner.